82-1110

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC., YELLOW FREIGHT SYSTEMS, INC., CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, ILLINOIS-CALIFORNIA EXPRESS INC., IML FREIGHT INC., PACIFIC INTERMOUNTAIN EXPRESS CO., T.I.M.E.—D.C. INC., CONSOLIDATED COPPERSTATE LINES, GARRETT FREIGHT LINES, INC., NAVAJO FREIGHT LINES, INC., N.W. TRANSPORT SERVICE, INC., RINGSBY TRUCK LINES, INC., RIO GRANDE MOTOR WAY, SALT CREEK FREIGHT WAYS, TRANSCON LINES, UNITED BUCKINGHAM FREIGHT LINES And WESTERN GILLETT, INC.,

Petitioners,

VS.

CLIPPER EXXPRESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

At issue here is the proper balance to be struck between the antitrust laws and the right to petition guaranteed by the First Amendment, as enforced by this Court under the *Noerr-Pennington* doctrine.[1] The Court of Appeals struck the balance against the First Amendment. Also at issue is whether the fact of antitrust injury may rest upon speculation. The Court of Appeals conceded that the claim in this case involves speculation, but held the degree of speculation to be acceptable.

The specific questions presented are:

1. Are First Amendment rights lost if a motor carrier's protest against a competitor's rate tariff is alleged to be baseless where (a) only one protest is filed, (b) the tariff protested is novel and experimental, (c) the protest's lack of success is the only objective evidence offered to support the allegation that the protest was "baseless" and (d) the protest does not bar anyone's access to the administrative process?

2. Are First Amendment rights lost if a motor carrier is alleged to have made misrepresentations to an administrative agency in a legislative-type proceeding where (a) the carrier's adversary can and does respond to the representations (b) the agency disregards them and (c) the agency rules against the party making them?

3. May an antitrust plaintiff, whose rates must be filed with and allowed by an administrative agency, base the fact of damage on speculation that the agency would have allowed it to charge an experimental rate that was not filed with the agency?

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[1] *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

LIST OF PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals for the Ninth Circuit are those listed in the caption of this Petition and Lee Way Motor Freight, Inc. Consolidated Freightways Corporation of Delaware is owned by Consolidated Freightways, Inc. and through its parent is affiliated with United Terminals, Ltd., CF Air Freight, Inc., Canadian Freightways Eastern, Ltd., Interport Sufferance Warehouse, Ltd., CF Data Services, Inc., and Centron, Ltd. Illinois-California Express Inc., is owned by ICX, Incorporated. N.W. Transport Service, Inc., is owned by Northwest Transport Service, Inc., and through its parent is affiliated with North Eastern Motor Freight, Inc. and Westway Motor Freight, Inc. Rio Grande Motor Way is owned by Rio Grande Industries, Inc., and through its parent is affiliated with Denver and Rio Grande Railroad. Pacific Intermountain Express Co. is affiliated with Ryder Truck Lines, Inc., and is owned by IU Transportation Services, Inc., which in turn is owned by IU International Corporation. Garrett Freight Lines, Inc., is affiliated with Associated Truck Line, Inc., New Life Transport Parts Center, Inc., Road Equipment Inc. and Graves Truck Line, Inc., and is owned by ANR Freight System, Inc., which in turn is owned by American Natural Resources Company. Navajo Freight Lines, Inc., and Consolidated Copperstate Lines are now owned by ABF Freight System, Inc., which is owned by Arkansas Best Corporation and is affiliated with Riverside Furniture Corporation, Arkansas Bandag Corporation, Data-Tronics Corp., Container Carrier Corporation, Arkansas Underwriters Corporation, Universal Insurance Company and Trans-States Lines, Inc.

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Petitioners,

VS.

CLIPPER EXXPRESS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 1252 and is reproduced as Appendix A. The District Court wrote no opinion. Its unreported orders granting petitioners' motion for summary judgment and denying respondent's motion to vacate the judgment are reproduced respectively as Appendix B and Appendix C. The Court of Appeals' order denying Petitioners' Petition for Rehearing with Suggestion for Rehearing *en Banc* is reported unofficially at 1982-83 Trade Cases ¶ 65,063; it is reproduced as Appendix D.

JURISDICTION

The Court of Appeals' judgment was entered on April 19, 1982. A timely Petition for Rehearing with Suggestion for Rehearing *en Banc* was denied on October 6, 1982. (App. D) This Petition is filed within 90 days of that date. The Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the First Amendment to the Constitution of the United States. The statutes involved are 49 U.S.C. §§ 1005-06, recodified as §§ 10761(a), 10762(a)(1) and 10708(a)(1). They are set out verbatim in Appendix E.

STATEMENT OF THE CASE

A. Nature of the Case.

This is a private antitrust action brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, by respondent Clipper Exxpress ("Clipper"). (C.T. 2) Clipper is a freight forwarder doing business as a common carrier regulated by the Interstate

Commerce Commission ("ICC") under the Interstate Commerce Act. Petitioners are Rocky Mountain Motor Tariff Bureau ("RMMTB"), an ICC-approved trucking rate bureau, and carrier members, some of whom compete with Clipper.

Clipper's antitrust claim is based upon RMMTB's protest of an experimental tariff series Clipper filed with the ICC. The protest was unsuccessful, and Clipper's rates went into effect as scheduled. Nevertheless, Clipper claims $90 million in damages (after trebling).

B. The Undisputed Facts.

The following facts were undisputed for purposes of the summary judgment motion. Almost all are based on Clipper's own admissions.

Interstate truckers (like the carrier defendants) and freight forwarders (like Clipper) may only charge rates that have been filed with and allowed by the ICC. (49 U.S.C. §§ 10761-62, 10708) Prior to 1970, the rate structure approved by the ICC for both truckers and freight forwarders generally specified different rates for different classes of commodities.

In 1970 Clipper decided to break from this rate structure and to charge a single rate for freight of all kinds, an "FAK" rate. Clipper wanted to set this rate at $842 per 30,000 pound shipment. However, Clipper knew that the ICC considered FAK rates to be suspect because they are potentially discriminatory and injurious to shippers of low-grade commodities.[2] Clipper also knew that if it published an FAK rate

[2] All-freight rates which apply on shipments of a single high-grade commodity necessarily ignore sound classification and commodity rate principles upon which the existing rate structures of the motor and rail carriers are constructed. If not restricted, such rates could break down these rate structures to the detriment of both the carriers and the public.

Merchandise To and From Chicago, 66 M.C.C. 287, 293 (1956). *See also TOFC Rates and Charges, Official Territory*, 337 ICC 557, 566 (1970).

This Court has held that FAK rates are not unlawful *per se*, but may be unlawful depending on their effects. *All States Freight* v. *New York, N.H. & N.R. Co.*, 379 U.S. 343 (1964).

as low as $842, "it would have been a guarantee—it would have been an absolute certainty it would have been suspended" by the ICC pending an investigation of its lawfulness. (Stelzer Deposition, p. 101) Clipper therefore decided not to ask the ICC for an FAK rate of $842 at the outset, but rather to move to that rate gradually, in pieces and over time. Thus, when Clipper filed its initial tariff ("Tariff 55"), in November 1970, it sought an FAK rate of $1,056 in a limited geographic area.[3] Clipper labeled Tariff 55 "experimental" right on its face, but Clipper did not disclose its intention ultimately to seek an $842 FAK rate for a broad geographic area.

Because Clipper's self-labelled "experimental" FAK Tariff 55 was a radical departure from the commodity rate system, RMMTB protested, requesting the ICC to investigate and disapprove Tariff 55 if it was unlawful.[4] The ICC's Board of Suspension found that there was "reason to institute an investigation to determine whether [Tariff 55] was . . . unjust and unreasonable" (C.T. 98-99, 133), but the ICC did not suspend the $1,056 rate, and its investigation did not prevent Clipper from operating under that rate immediately.

The ICC investigation was an adversary proceeding in which RMMTB and Clipper advocated their conflicting positions. The investigation lasted six months. On June 29, 1971, the ICC hearing officer approved the $1,056 FAK rate as a "lawful innovation and experiment." (C.T. 49) RMMTB appealed, but the decision was sustained by a Review Board on

[3] The tariff, designated as Freight Forwarders Tariff Bureau Tariff 55, applied to all transcontinental freight forwarders, but it was proposed and primarily defended before the ICC by Clipper alone.

[4] Prior to Clipper's experimental Tariff 55, defendants had not protested any freight forwarder tariff for three years. And, in the five years before that, defendants had protested only four of the 1,885 freight forwarder tariffs which sought reduced rates. (C.T. 605-06, 2138; Chambers Deposition, p. 100)

August 14, 1972, by Division 2 on May 31, 1973 and by the Commission itself on June 11, 1973.[5]

The ICC's investigation and the subsequent appeals did not prevent Clipper from pursuing its piecemeal filing strategy. Commencing February 16, 1971, it filed seven progressively lower and geographically broader rates under Tariff 55. The seventh and last of these new rates was filed September 16, 1972. It contained the $842 FAK rate Clipper ultimately had in mind. To prevent its protest of the $1,056 FAK rate from becoming moot, RMMTB protested each of Clipper's new FAK rates.[6] But Clipper's filing strategy worked exactly as it had planned. Although the ICC investigated some of the rates, it did not suspend any of them, and they all went into effect right on schedule.[7]

C. Proceedings Below.

Despite the unqualified success of its ICC strategy Clipper was not satisfied. On May 12, 1972, it filed this action, claiming that RMMTB's protest of Tariff 55 was a sham, that RMMTB defrauded the ICC and that defendants unlawfully conspired to fix their own transcontinental rates. Clipper claimed $90 million (after trebling) on the hypothesis that but for

[5] In 1977 Clipper filed an amended complaint alleging for the first time that during the ICC investigation RMMTB made misrepresentations to the ICC about carrier costs and about the law applicable to Tariff 55. (C.T. 778) However, Clipper admitted that the alleged misrepresentations about costs were made only *after* the ICC already had initiated its investigation. (Docket No. 509, Ex. D; C.T. 2123-28; Chambers Deposition, p. 321 and Exhibit 11) Clipper also admitted that it could and did respond to the alleged misrepresentations, that the ICC had its own independent information about carrier costs and, of course, the law, and that the entire investigation lasted less than six months. (Stelzer Deposition, pp. 51-55; Chambers Deposition, pp. 365, 373-74; R.T. Vol. 3, pp. 151-52; Docket No. 509, Ex. D) Thus, no representation by RMMTB caused the ICC's investigation, or affected its outcome, or prevented Clipper from operating under the rates it had filed.

[6] RMMTB did not protest other freight forwarder tariffs filed on behalf of Clipper during this period.

[7] The Court of Appeals' description of this process contains two significant errors. First, the ICC investigation lasted six months, not two years. (App. A, p. A-3) Second, Clipper's $842 rate was not filed at "the conclusion of [the] administrative process." (App. A, p. A-4) It was filed on September 16, 1972, eight months before the conclusion of the process. Thus, the process was brief and its pendency did not deter Clipper from filing and operating under any tariff it chose to file.

RMMTB's protest the ICC would not have investigated the $1,056 FAK rate, that Clipper would then have filed the $842 rate two years sooner than it did, that the ICC would not have investigated the $842 rate either and that the $842 rate would have increased its net profits by $30 million—more than 400 percent. (Docket No. 509, Exhibit B and Exhibit C, Answer to Interrogatory No. 34)

In June 1978, after six years and completion of discovery, defendants moved for summary judgment on the basis of Clipper's admissions and the undisputed facts.[8] The District Court found there was no dispute as to any material fact, that defendants' protest of Tariff 55 was protected by the First Amendment under the *Noerr-Pennington* doctrine and that Clipper's injury claim was speculative and barred as a matter of law by *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Accordingly, the motion was granted and judgment was entered for defendants. (C.T. 2089-91) Clipper's motion to vacate the judgment and for reconsideration was denied. (C.T. 2233-34)

The Court of Appeals reversed. It held that:

1. The District Court erred in holding that RMMTB's protest of Tariff 55 was protected by the First Amendment. Instead, according to the Court of Appeals, a single administrative protest of an admittedly experimental tariff may be "baseless" and within the "sham" exception to the *Noerr-Pennington* doctrine, although there is no objective evidence of baselessness except the protest's lack of success and no evidence that the protest barred anyone's access to the administrative process. (App. A, pp. A-12-A-28)

2. The District Court erred in not letting Clipper go to trial on its claim of RMMTB's alleged misrepresentations to the

[8] In addition, for purposes of the motion only, defendants admitted (1) the existence of an alleged conspiracy to fix defendants' own transcontinental rates (because any such conspiracy was expressly exempted from the antitrust laws by 49 U.S.C. § 5b, recodified as 49 U.S.C. §10706, and, in any event, would not strip the protest of its immunity), and (2) that defendants' purpose in protesting Tariff 55 was to prevent and eliminate rate competition (because *Noerr* and *Pennington* both hold that efforts to influence public officials cannot violate the antitrust laws no matter how anticompetitive their purpose). (C.T. 1830, Docket No. 508, pp. 5, 31)

ICC. Instead, under the Court of Appeals' interpretation of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), an antitrust plaintiff can get to trial by claiming that misrepresentations were made in a legislative-type ICC investigation, even though the plaintiff had full access to the ICC to refute the alleged representations, the ICC was not deceived by them and there was no evidence that the representations in any way corrupted the ICC's investigation. (App. A, pp. A-28-A-34)

3. The District Court erred in holding that Clipper's speculative injury claim was legally insufficient. Instead, according to the Court of Appeals, this Court's decision in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), allows a claim of antitrust injury to be based upon speculation that (1) a particular low experimental rate would have been filed two years sooner than it was filed, (2) the ICC would not have investigated the rate if it had been filed two years sooner than it was filed, and (3) the lower rate would have caused plaintiff's net profits to be $30 million higher than they actually were. (App. A, pp. A-39-A-42)

REASONS FOR GRANTING THE WRIT

I. Summary of Reasons for Granting the Writ

Defining the elements and proper scope of the "sham" exception to the *Noerr-Pennington* doctrine is an important and recurring antitrust problem that has divided the lower courts for the decade since this Court last addressed it. This case poses the problem in its clearest form, as a pure question of law. The Court of Appeals' holding that a single protest may be a "sham" although there is no objective evidence of baselessness except lack of success, and although the protest does not bar access to the administrative process, conflicts with the *Noerr-Pennington* doctrine as it has been defined by this Court and applied by other courts of appeals. The effect of the Court of Appeals' decision is to make the "sham" exception to *Noerr-Pennington* immunity so broad that it swallows up the immunity itself. This threat to the First Amendment right of petition makes the need for this Court to grant the writ all the more compelling.

The Court of Appeals' holding that an antitrust plaintiff can get to trial by claiming that misrepresentations were made to an agency in a legislative-type proceeding, even if plaintiff could and did respond to the alleged representations, and even if the agency was not deceived by them, is contrary to the Court's decisions in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), and to the cases applying those decisions. The effect of the Court of Appeals' rule will be to chill the vigorous advocacy which is encouraged in forums where opposing parties are able to debate and to contradict one another. This problem is also one of continuing importance in the administration of the antitrust laws. The Court has not squarely addressed it for seventeen years.

The Court of Appeals' holding that the fact of injury in an antitrust case can rest upon speculation that an administrative agency would not even have investigated an experimental tariff for which its permission was required but not sought conflicts with this Court's decisions in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931) and *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), and with decisions of other courts of appeals which hold that the trier of fact may not speculate about the fact of injury in antitrust cases. This, too, is a question of major importance to future antitrust litigation.

II. The Court of Appeals' Decision on the Sham Exception Conflicts with Decisions of This Court and Several Courts of Appeals and with the First Amendment Itself.

This Court held in *Noerr, Pennington* and *Trucking Unlimited*, that concerted efforts to influence governmental action (whether legislative, executive, judicial or administrative) are exercises of the right to petition that are absolutely immunized

from antitrust liability by the First Amendment.[9] The Court allowed for a narrow exception to this immunity where ostensible petitioning activity involves no real effort to influence a public official but rather is a "sham" to cover direct interference with a competitor. *Noerr*, 365 U.S. at 144.

Although the intersection between the First Amendment and the antitrust laws (the "charter of economic liberty") is a recurring problem of obvious importance, this Court has addressed it directly only once. In *Trucking Unlimited* the Court found the "sham" exception satisfied by allegations of three elements: a "pattern of [1] baseless, [2] repetitive claims" which produced an "illegal result, *viz.*, [3] effectively barring respondents from access to the agencies and courts." 404 U.S. at 513. This Court has not explicitly considered whether the "sham" exception might apply in the absence of one or more of these elements, but it has rendered decisions that make matters uncertain.[10]

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[9] For example, in *Noerr* the findings of fact established that in the course of seeking legislation the defendant railroads had conducted a malicious and fraudulent publicity campaign for the sole purpose of destroying truckers as competitors. The railroads' purpose was to injure the truckers in every way possible even though no legislation was secured, and the railroads actually did inflict direct injury on the truckers. 365 U.S. at 133, 138, 142-43. Nevertheless, this Court unanimously held that the legality of the railroads' campaign "was not at all affected by any anticompetitive purpose it may have had," that the fraud "was, so far as the Sherman Act is concerned, legally irrelevant" and that the direct injury which the railroads knowingly inflicted on the truckers was also immune as an inevitable effect of any campaign. 365 U.S. at 140, 142-44.

[10] In *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), the Court seemingly held that the access-barring element was not required where the defendant was charged, not with preventing plaintiff from access to a court or agency, but rather with forcing plaintiff into litigation, the pendency of which blocked it from getting financing, and where the other two elements—multiple and baseless lawsuits—were present. In *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623 (1977), four dissenting Justices stated that the "sham" exception might apply to a single baseless lawsuit. Two concurring Justices squarely disagreed, while the three-Justice plurality stated that "*repetitive*, sham litigation . . . may constitute an antitrust violation," 433 U.S. at 635 n.6 (emphasis added), but otherwise took no position on the question. The Court of Appeals in this case says that in *Vendo* this Court was "given the opportunity" to decide whether the "sham" exception can apply to a single suit but "avoided the question." (App. A, p. A-21 n.24)

The uncertain state of the law in this Court is reflected in the lower courts and in the commentaries.[11] The lower courts are divided, for example, with respect to the elements of repetitive action[12] and access-barring.[13] (An outline of irreconcilable decisions on all aspects of the "sham" exception is set forth in Appendix F.) The Ninth Circuit itself is in a state of total confusion about the "sham" exception. After the decision in this case, another panel of that court declared:

> In this circuit, the sham exception was initially construed quite narrowly . . . but has recently been given broader application . . . . As we conceded recently, "There is no precise definition to the sham exception." . . . We therefore decline to utilize the sham-exception analysis here in our examination of the interests upholding *Noerr-Pennington.*

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[11] Commentators: R. Bork, THE ANTITRUST PARADOX 349 (1978) ("The Supreme Court's opinions in these cases by no means completely clarify the law and its criteria"); E. Kintner, I FEDERAL ANTITRUST LAW § 5.12, at 273 (1980) ("[T]he standard enunciated in *California Transport* . . . is a difficult standard to define"); Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. CHI. L. REV. 80, 86 (1977) ("[T]he Supreme Court's failure . . . to indicate the limits of the antitrust exemption for attempts to influence governmental action has understandably confused the lower courts").

Lower courts: *See, e.g., Metro Cable Co.* v. *CATV of Rockford, Inc.,* 516 F.2d 220, 225 n.6 (7th Cir. 1975) ("Commentators and courts have disagreed about the implications of [*Trucking Unlimited*]"); *Ross* v. *Bremer,* 1982-2 Trade Cases ¶ 64,746, at 71,618 (W.D. Wash. March 16, 1982) ("No satisfactory definition of the sham exception to *Noerr-Pennington* immunity exists"); *United States* v. *American Telephone & Telegraph Co.,* 524 F. Supp. 1336, 1362 (D.D.C. 1981) ("[I]n various cases the courts have come to conclusions that are not always easy to reconcile"); *City of Gainsville* v. *Florida Power & Light Co.,* 488 F. Supp. 1258, 1264-65 (S.D. Fla. 1980) ("Lower courts have variously interpreted the sham exception").

[12] The full extent of the division is shown in Appendix F. For example, compare *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.,* 560 F.2d 211 (6th Cir. 1977) (requiring multiple actions), with *Feminist Women's Health Center* v. *Mohammed,* 586 F.2d 530, 543 n.6 (5th Cir. 1978) (holding one action sufficient), *cert. denied,* 444 U.S. 924 (1979).

[13] This division is also shown in Appendix F. For example compare *Miracle Mile Associates* v. *City of Rochester,* 617 F.2d 18, 21 (2d Cir. 1980) (requiring full access barring), with *Hydro-Tech Corp.* v. *Sundstrand Corp.,* 673 F.2d 1171 (10th Cir. 1982) (requiring interference with the legal process).

In re Airport Car Rental Antitrust Litigation, 1982-83 Trade Cases ¶ 65,039 at 70,792 n.3 (9th Cir. 1982) (citations omitted).

The conflicting decisions and uncertainty make parties' rights and duties vary by geographic accident and breed more litigation over the proper scope of the "sham" exception to *Noerr-Pennington.*

Despite this uncertainty, before the Ninth Circuit's decision here, no court had even suggested that the "sham" exception could be applied where *none* of the three *Trucking Unlimited* elements was present. That, however, is the effective result of the Court of Appeals' decision in this case. Under the "sham" exception fashioned by the court below, no "pattern of repetitive claims" is needed; one is enough. (App. A, pp. A-19-A-23) Nor is it necessary that the single protest or lawsuit be truly "baseless"; lack of success is enough objective evidence to get the plaintiff to trial—even if the protest is directed against a rate that is admittedly "experimental." (App. A, p. A-23)[14] Finally, there is no need to show access barring. (App. A, pp. A-23-A-28)

The Court of Appeals' expansive decision is a major departure from the "sham" exception that this Court defined narrowly to protect the First Amendment right to petition. Obviously the decision cannot be reconciled with *Trucking Unlimited.* Nor can it be reconciled with *Noerr,* where this Court held that even a malicious and fraudulent publicity campaign intended solely to injure a competitor, and which does directly injure him, is protected by the First Amendment from antitrust attack. (p.9, n.9, above)

The Court of Appeals' decision also conflicts with decisions from other circuits with respect to all three of the *Trucking Unlimited* elements. First, as the court below notes, there is a

[14] The Court of Appeals itself seems uncertain about this aspect of its decision. At one point it says that lack of success alone is sufficient proof of baselessness to prevent summary judgment. (App. A, p. A-23) At another point it says that lack of success is sufficient when combined with evidence that the protest was not filed with any intent to influence the ICC. (App. A, p. A-18)

clear split among the Circuits (as in this Court) regarding its conclusion that the "sham" exception can apply to a single protest or lawsuit. (App. A, p. A-21, n.24) *See* App. F, pp. F-52-F-55.

Second, contrary to the decision below, the courts in other Circuits have refused to treat lack of success as sufficient objective evidence of "baselessness." (App.F, pp. F-55-F-59) Indeed, some decisions have held that even lack of probable cause cannot properly be treated as a basis for applying the "sham" exception.[15]

Third, again contrary to the decision below, the Second, Seventh, Eighth, Tenth and District of Columbia Circuits all have held that the "sham" exception applies only where the defendants have barred the plaintiff's access to the administrative or judicial process.[16] Even in Circuits where true access barring is not required, the courts have explicitly required some other evidence of *interference* with the judicial or administrative process for the "sham" exception to apply.[17]

Taken separately, the components of the Court of Appeals' redefinition are questionable and unwise. Taken together, their practical effect is to vitiate *Noerr-Pennington* and to chill the exercise of First Amendment rights over a broad range of petitioning activity before a myriad of local, state and federal courts, agencies and boards. In particular, the Court of Appeals' holding that lack of success may be sufficient objective evidence to support a finding that a protest or other use of legal process was "baseless" must surely chill the exercise of those

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[15] *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982) (" 'sham' is something more than a mere 'absence of probable cause' "); *United States* v. *American Telephone & Telegraph Co.*, 524 F. Supp. 1336, 1363-64 (D.D.C.1981). *See also Alexander* v. *National Farmers Organization*, 687 F.2d 1173, 1200 (8th Cir. 1982) (existence of "genuine disputes" precludes finding of baselessness).

[16] *See, e.g., Miracle Mile Associates* v. *City of Rochester*, 617 F.2d 18, 21 (2d Cir. 1980) (" '[A]ccess barring is the cornerstone to the sham exception.' "); *City of Mishawaka* v. *American Electric Power Co.*, 616 F.2d 976, 982 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981); *Mark Aero, Inc.* v. *Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978). *See also* other cases cited in Appendix F, pp. F-59–F-63.

[17] *Hydro-Tech Corp.* v. *Sundstrand Corp.*, 673 F.2d 1171, 1176 (10th Cir. 1982). *See Mid-Texas Communications Systems, Inc.* v. *American Telephone & Telegraph Co.*, 615 F.2d 1372, 1384 n.10 (5th Cir. 1980), *cert. denied*, 449 U.S. 912 (1981).

rights.[18] The chilling effect is increased exponentially by the Court of Appeals' further holdings that just one unsuccessful action may invoke the "sham" exception and that it need not bar access to the process.

The most obvious effect of the decision below will be to deter the assertion of any novel or unusual legal theory. But the effect will be much broader than that. The decision will also deter the pursuit of even routine administrative and judicial action. For example, the ICC and most state administrative agencies have extremely broad discretion in determining whether a rate is acceptable.[19] Thus, inherent in *every* rate protest is a substantial risk that it will be unsuccessful. If the result of making an unsuccessful protest is what the Court of Appeals holds in this case, protest will be inhibited and state and federal agencies will be deprived of information they need to make informed decisions.[20]

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[18] It is clear that "baselessness" must be determined by an objective standard, and that lack of success is not sufficient. P. Areeda, ANTITRUST LAW ¶¶ 203.1c, 203.1e (Supp. 1982). Indeed, lack of success alone should not even be relevant to the question. As Professor Areeda puts it:

> The mere fact that the antitrust defendant was unsuccessful in the other forum does not mean that it was unreasonable of him to pursue his interest there. Many altogether reasonable claims or defenses are lost. While victory presumptively demonstrates reasonableness, defeat leaves that issue altogether open.

Id. ¶ 203.1e at 7.

[19] *See Aberdeen & Rockfish R.Co.* v. *SCRAP*, 409 U.S. 1207, 1208 (1972) (The Commission has "broad discretion in the exercise of its power of suspension. . . . "); *Akron, Canton & Youngstown R.Co.* v. *United States*, 586 F.2d 29, 32 (7th Cir. 1978) ("The Commission's broad discretion in the rate-making process applies to the separate elements of that process. . . . ").

[20] In 1981 alone there were 654,069 tariff applications filed with the ICC by carriers subject to its regulation. ICC 1981 ANNUAL REPORT, Appendix B, Table 7, at p. 105. Obviously, the ICC needs all the help it can get from interested parties.

> In our system of representative government, participation in governmental decision-making by persons affected by it is an affirmative good. This is particularly true in the case of administrative agencies. . . .

Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 MICH L. REV. 521, 574 (1977). *Accord*, Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 118 (1977); Stewart, *Regulation, Innovation and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1274 (1981); Bakke, *Joint Efforts in Developing Standards*, 44 ANTITRUST L. J. 337, 342 (1975); K. Davis, ADMINISTRATIVE LAW TEXT § 6.03 (3d ed. 1972); K. Davis, ADMINISTRATIVE LAW TREATISE § 7:6 (2d ed. 1979).

In sum, the Court should grant the writ to resolve conflicting decisions and to restore the proper balance between the antitrust laws and the First Amendment.

III. The Court of Appeals' Decision on the "*Walker Process* Doctrine" Conflicts with Decisions of This Court and Threatens the Exercise of First Amendment Rights.

The Court of Appeals' decision on the "*Walker Process* doctrine" is bad antitrust law, bad fraud law and bad for the exercise of First Amendment rights.

Contrary to what the court below says, this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), does not provide "antitrust liability for the commission of fraud on administrative agencies, for predatory ends." (App. A, p. A-29) *Walker Process* was an action to enforce a patent. The defendant counterclaimed under Section 2 of the Sherman Act, alleging that the patent had been obtained by plaintiff's fraudulent representations to the Patent Office. This Court held that if the patent was obtained by fraud, it would lose its antitrust exemption, and plaintiff's market position would be subject to regular antitrust analysis. 382 U.S. at 177. Under *Walker Process* it is not the fraud on the Patent Office that creates antitrust liability; rather, it is the enforcement of the unprotected monopoly.

This Court has never considered whether an allegation of fraud on an administrative agency by itself will support an antitrust claim. If and to the extent it will, there are good reasons for confining the doctrine to the unique patent setting involved in *Walker Process.* First, the patent application process is *ex parte,* even secret, 35 U.S.C. § 122; there is no adversary process and no independent source of information to help the agency learn the truth. This lack of safeguards makes a patent proceeding vulnerable to fraud in a way that most other agency proceedings are not. *See* P. Areeda, ANTITRUST LAW ¶¶ 204.1c at 29, 204.1d at 31 (Supp. 1982). Second, unless specific statutory criteria are satisfied, the Patent Office

has no power to issue a patent. (35 U.S.C. § 102) Thus, the effect of fraud on the Patent Office decision is certain. Other agencies, like the ICC here, have wide discretion in determining whether to grant a request; predicting what the agency would have done "but for" the fraud is entirely speculative. *See* P. Areeda, ANTITRUST LAW ¶ 204.1d at 30 (Supp. 1982). Third, the issuance of a patent automatically confers a complete monopoly. This immediate and obvious threat to competition is not present in most orders of other agencies.[21] In sum, in the patent setting the need for protection against fraud is great and the danger to competition is clear. This is not true of other agencies such as the ICC.

Moreover, even if the "*Walker Process* doctrine" applied outside the patent context, the Court of Appeals' version of it in this case bears no resemblance to *Walker Process*. In *Walker Process* the fraud served only to remove the antitrust immunity it had procured so that traditional antitrust principles could be applied. Here, the alleged fraud is held to be "*the basis for antitrust liability,* if the requisite predatory intent is present and the other elements of an antitrust claim are proven." (App. A, p. A-30; emphasis added) That holding makes no sense. If the other elements of an antitrust claim are proven, making fraud "the basis" of the claim is pointless. It is also wrongheaded, for it diverts attention from antitrust analysis and focuses it instead on an inflammatory issue having no antitrust or economic significance. That is bad antitrust law.

The Court of Appeals' decision is even bad fraud law, for it is a doctrine of fraud under which no one need be defrauded. Assuming RMMTB submitted false information to the ICC, it is undisputed that neither Clipper nor the ICC was deceived. Clipper responded with information and arguments of its own, and the ICC ruled against RMMTB. The Court of Appeals' only response to this fact is to say that *Walker Process* does not "*require* that the body on whom the fraudulent misstatements are pressed ultimately believe those statements." (App. A,

[21] This case, of course, does not involve any effect on competition. RMMTB's alleged fraud did not cause the ICC to issue any order or to do anything at all.

pp. A-32-A-33) That misses the whole point of *Walker Process*. If the Patent Office had known the truth it would not have issued the patent.[22] There would have been no case and no "*Walker Process* doctrine." The same should be true here. *See* P. Areeda, ANTITRUST LAW ¶ 204.1d (Supp. 1982).

Additionally, the Court of Appeals' "*Walker Process* doctrine" presents a clear threat to the legitimate exercise of First Amendment rights protected by the *Noerr-Pennington* doctrine. The court below refuses to acknowledge this, asserting that fraud in administrative or court proceedings is not protected by the First Amendment. (App. A, p. A-31) That is a truism; however, it does not come to grips with the problem and it ignores the teaching of *Trucking Unlimited*. First, it conflicts with the express statement in *Trucking Unlimited* that *Noerr-Pennington* immunity applies to claims of misrepresentation in legislative proceedings, and that a claim based on alleged misrepresentations could lie only if the proceeding were adjudicatory. The alleged misrepresentations here were in a rate making proceeding—a process that this Court has repeatedly described as legislative rather than adjudicatory. *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 386-89 (1932); *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). Thus, the "fraud" theory fails even the threshold test.

Second, *Trucking Unlimited* makes clear that First Amendment values may not be jeopardized by allowing antitrust claims based on simple allegations of fraud. As the Court observed, opponents in litigation frequently charge each other with fraud. For this reason, the Court held that there must also be an "illegal result." 404 U.S. at 513. The Court of Appeals' only answer to this point is to say that *Trucking Unlimited* did not involve "claims arising from the furnishing of fraudulent

[22] Indeed, it *could* not have issued the patent because the fraud concerned the extent of prior use of the invention, a statutory condition as to which the Patent Office has no discretion. 35 U.S.C. § 102(b). Here, of course, the ICC had discretion to investigate, suspend and disapprove Clipper's experimental tariff *regardless* of the truth or falsity of any representations by RMMTB. (p. 13 above)

information for predatory purposes." (App. A, p. A-34) That is no answer at all. A false representation that is not believed and has no effect is not even a common tort. *Alberta Gas Chemicals, Ltd.* v. *Celanese Corp.*, 650 F.2d 9 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3456 (Dec. 13, 1982) (specifically so holding with respect to fraud on an administrative agency). To make it sufficient evidence to support an antitrust violation, as the Court of Appeals has done in this case, is indefensible.

If such charges can be prosecuted as antitrust treble damage claims, with the enormous burden and expense that such claims entail, the net result will not be simply to eliminate fraud; it will also choke off the kind of robust debate that is favored where adversaries are present to contradict each other. That is why this Court in *Trucking Unlimited* imposed limitations on the circumstances in which such claims can be prosecuted, safeguards eliminated by the court below.

The Court should review and repudiate the "*Walker Process* doctrine" created by the Court of Appeals.

IV. The Court of Appeals' Decision Permits Speculation as to the Fact of Damage in Treble Damage Cases and Therefore Conflicts with This Court's Decisions in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922), *and Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

The Court of Appeals' allowance of Clipper's damage claim conflicts with the settled general principle that precludes speculation on the fact of damage in antitrust cases, and with the particular application of that principle in *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156 (1922). In *Keogh*, the plaintiff shipper complained that a group of rail carriers had conspired to raise and fix freight rates higher than the rates that would have been charged absent the unlawful conduct. Plaintiff sought damages based on the extra profits it would have earned if the lower, non-fixed rates had continued in effect. This Court held as a matter of law that plaintiff could not recover such damages under the antitrust laws.

Since *Keogh*, the principle precluding speculation as to the fact of antitrust damage has become an axiom.[23] Moreover, it has been specifically applied to prevent a damage claim based on the assumption that the ICC or a similar agency would have permitted a regulated carrier to charge rates different from those on file.[24] Indeed, this application of the principle was reaffirmed only a year ago in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981). The Louisiana Supreme Court had held that natural gas producers were entitled to recover damages from their customers for breach of contract, measured by the difference between the rates actually filed with the Federal Power Commission and the rates that would have applied but for the breach of contract. This Court reversed, and said:

> No matter how the ruling of the Louisiana Supreme Court may be characterized, [petitioners] argue, it amounts to nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case. This, they contend, is precisely what the filed rate doctrine forbids. We agree. It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act.

453 U.S. at 578-79.

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[23] *See Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *Shumate & Co.* v. *National Ass'n of Sec. Dealers, Inc.*, 509 F.2d 147, 152 (5th Cir. 1975) ("[C]ourts do not permit the fact of damage necessary to prove liability to be based on speculation"), *cert. denied*, 423 U.S. 868 (1975); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F.2d 874 (1st Cir. 1966) (fact of damage must be established by a "reasonable probability there was a substantial causal connection" between plaintiff's injury and defendant's misconduct).

[24] *See Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 453 (1945); *Monticello Heights, Inc.* v. *Morgan Drive Away, Inc.*, 1974-2 Trade Cases ¶ 75,282 at 97,862 (S.D.N.Y. Sept. 30, 1974) (damages based on hypothetical rate determination are "entirely speculative" and cannot be awarded); *City of Newark* v. *Delmarva Power & Light Co.*, 467 F. Supp. 763, 770 (D. Del. 1979) (no legal right to pay or receive any price other than that fixed or accepted by FPC); *McLeran* v. *El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972), *aff'd without op.*, 491 F.2d 1405 (5th Cir. 1974).

The Court of Appeals' decision here would destroy the principle. The Court of Appeals acknowledges that one of the bases of *Keogh* was that judicial relief "would require the [antitrust] court to speculate on the level [at which] the rate would have been set by the carriers and approved by the ICC absent the conspiracy, thereby assuming what ICC action would be." (App. A, p. A-41) The Court of Appeals also acknowledges that Clipper's primary damage claim is that petitioners' protest prevented it from filing the $842 rate for two years. Thus, it rests on the hypothesis that if Clipper had filed the $842 rate two years earlier than it did, the ICC would have approved it. (App. A, p. A-39, A-41) And the Court of Appeals agrees that "there is no certainty the rate would have been approved." (App.A, p. A-42) Nevertheless, it concludes that Clipper can make the damage claim because "[t]he speculation involved in the instant case . . . in no way approaches the degree of speculation disallowed in Keogh." (*Id.*)

The Court of Appeals' analysis is dead wrong. The degree of speculation disallowed in *Keogh* was far less than that involved in this case. In *Keogh* the plaintiff wanted to assume only that a rate which actually had been in effect would have *continued* in effect. 260 U.S. at 160. In this case the plaintiff wants to assume that an experimental rate that had *never* been in effect, and that was expected to draw protest, would have gone into effect without even an investigation two years before it was actually filed.

More important, this Court held the assumption in *Keogh* to be speculative simply because the ICC was empowered to disapprove the rate. 260 U.S. at 164. Thus, the question does not turn on a court's assessment of the degree of speculation involved. *Keogh* forbids *any* speculation about what the ICC would have done with respect to an unfiled rate.

In sum, the Court of Appeals has opened the door to damage claims requiring antitrust courts to make hypothetical rate decisions even the ICC is not empowered to make. *See* 260 U.S. at 162. Beyond that, the court below has opened the door to speculation about the fact of damage in antitrust cases

generally, where the consequence of miscalculation is trebled. This Court should review the decision below and close these doors.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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